MISCELLANY.

PRIORITY OF RAILROAD RECEIVERS' CERTIFICATES OVER EXISTING MORTGAGES.—The power of courts of equity to authorize railroad receivers to issue certificates having priority over existing mortgages is now well established. *Kneeland* v. *American Loan & Trust Co.*, 136 U. S. 89; *Bank of Commerce* v. *Central Coal & Coke Co.*, 115 Fed. Rep. 878 (C. C. A., Eighth Circ.). The limits of that power, however, have not yet been fixed, and there has been an alarming tendency to juggle interests and rights without due regard for the bondholders. The decision of a recent case emphasizing the need of caution in the exercise of this extraordinary right is a welcome check. Certificates were issued to complete a road only one-third built, and later a second series was issued with priority over the first, the result being sure loss to the first mortgagees and only conjectural benefit to the other creditors. The Court of Appeals, in reversing the ruling of the lower court, well said, "The appointment of a receiver vested in the court no absolute power over the property, and no general authority to displace vested contract liens." *Bibber-White Co.* v. *White River etc. Co.*, 115 Fed. Rep. 786 (C. C. A., Second Circ.).

The subordination of existing mortgages and prior liens to liens for running expenses is justified under the plea of necessity rather than defended on principle. The argument is twofold. The peculiar nature of the corporate business makes it imperative that the railroad should be kept running if the property is to be preserved. Loans for this purpose can be secured only by granting priority of lien, and thus this power, though dangerous, is necessary for the ultimate protection of even the bondholders. The same reasoning shows that the stockholders and the other creditors will often have to depend on such action by the court as their only hope of relief. Again it is urged that the court in charge of the railroad must continue it in operation to enable it to fulfill its obligations to the public. It would seem that both these reasons, or at least the first, should exist in any given case before the vested rights of the mortgagees should be displaced. It is on the element of public duty, however, that the chief emphasis has been laid, and consequently the doctrine has not been applied to private corporations owing no such duty. *Baltimore etc.* v. *Alderson*, 32 C. C. A. 542. On the other hand, probable loss to the mortgagees has not always been thought a fatal objection when the public welfare was concerned. *Ellis* v. *Vernon Ice etc. Co.*, 4 Tex. Civ. App. 66; see 7 Harv. L. Rev. 375. The arguments based on the interest of the public and on the probable ultimate benefit of all the parties interested lead on to an indefinite extension of the doctrine, and the danger lies in the lack of a fixed limit. This is shown in cases where the courts have considered it their duty to complete unfinished roads. *Miltenberger* v. *Logansport Ry. Co.*, 106 U. S. 286. The action of the lower court in the principal case is the most extreme instance of this danger. It is conceded that the bondholders have a right to be notified so that they may appear and argue against the issue of the certificates. But that precaution helps little if the test is to be not their interest but that of the public. It is claimed that in extending credit to the railroad they have taken the risk of the issue of certificates with the consequent

postponement of their liens. But it is unjust to force them to take the chance of arbitrary action. The question before the court in each case should be not a balancing of benefits to see whether the gains will be greater than the losses to all concerned, treating all on an equal footing, but whether the probable protection of the bondholders and the benefit to the other interested parties and to the public require and justify interference with vested rights otherwise sacred.—*Harvard Law Review.*

PUBLICATION OF PHOTOGRAPH AS AN ADVERTISEMENT.—In the present number of this *Review* Judge O'Brien, of the New York Court of Appeals, defends the decision of that court denying any remedy, so long as the publication is not libellous, to a girl whose photograph had been used as an advertisement without her consent. *Roberson* v. *Folding Bbx Co.*, 171 N Y. 538. When the defendant's demurrer was overruled in the lower court (64 App. Div. 30), we commended the decision (see 1 *Columbia Law Review*, 591); and, with due deference to the learned judge, are still inclined to the same view.

The feeling that everyone has a right to a certain amount of privacy in his life is widespread. As to the extent of the right, however, this feeling is very indefinite. A right as extensive as that said by Chief Judge Parker to have been claimed in the *Roberson* case, a "right to pass through this world, if a man wills, without having his picture published, his business enterprises discussed, his successful experiments written up for the benefit of others, or his eccentricities commented upon," would be more than the public would admit. It would be a very unsocial right. Everyone claims an antagonistic right to know some things about his fellows, things which are important for him to know politically, or in connection with business, and other things which interest him with merely a human interest. The line between the things which the individual has a right to keep to himself, and those in which society may have a legitimate interest, is yet to be drawn; it is a question of conflicting claims, and public opinion has not settled whether a newspaper has a right to print an account of a wedding with a picture of the bride, and whether one private citizen can take a snapshot photograph of another for his own amusement.

But there is a great difference between publishing a person's photograph for the satisfaction of social curiosity, and publishing it as an advertisement. In the former case privacy conflicts with a social claim, a right akin to freedom of thought and speech; in the latter privacy is made to yield to the claim of another individual to make commercial profit. This difference is the foundation of the prevailing public belief that in the *Roberson* case there was a right invaded, whether the courts recognized such a right or not.

There being an injury, is there any remedy, or is the law at fault? The Court of Appeals has taken the latter view, suggesting remedial legislation. The reasons for refusing a remedy are, that otherwise a flood of litigation would ensue, and that a court of equity has no jurisdiction except where property is concerned. The first objection would be considerable, if a decision for the plaintiff would have established an indefinite right of privacy, a general right to be let alone. But that result would not necessarily follow, because the present case rests on narrower principles, as already shown. In regard to the second point, if a property basis really is necessary for equity jurisdiction, it is no great

stretch of legal ideas to say that everyone has a property right in his own form, as was urged by Rumsey, J., in the lower court. Its value as property is proved by the use made of it in the case in hand. When the description of property kept in private is an invasion of the owner's property rights, *Prince Albert* v. *Strange* (1849), 2 DeG. & Sm. 652, 1 McN. & G. 25, the reproduction of a person's features for advertisement would seem no less so. But it may even be questioned whether a property basis is necessary. In reading *Gee* v. *Pritchard* (1818), 2 Swanst. 402, and *Prince Albert* v. *Strange*, *supra*, one cannot but feel that the real object of the courts in granting, as well as of the plaintiff in asking, the injunctions was to protect privacy, and the use of property rights as a ground of jurisdiction was merely a fiction. "Privacy is the right invaded," said Lord Chancellor Cottenham (1 McN. & G. 47), and the right of preventing publication altogether was considered at least as important as the right to the profits of publication. It would not be a greater step than has been taken at other times, to cast off the fiction of protecting property and in terms protect the more personal right.

The conservatism of the decision expresses the court's belief that society has reached a state where law must progress by legislation; but the general adverse criticism it has received indicates an opposing belief in Sir Henry Maine's generalization, that between the periods of fiction and legislation there is another agency in the growth of the law, namely, equity.—*Columbia Law Review.*